

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

EDWARD E. KRYZANOWSKI, *et al.*,

Plaintiffs,

v.

WYNDHAM HOTELS AND RESORTS,
LLC, *et al.*,

Defendants.

Case No. 13-cv-1077-L(MDD)

**ORDER DENYING DEFENDANTS'
MOTION TO DISMISS FOR *FORUM
NON CONVENIENS* [DOC. 20.]**

____ Pending before the Court is Defendants' motion to dismiss for *forum non conveniens*.
(*MTD* [Doc. 20-1].) The motion is fully briefed. (*Opp'n* [Doc. 23]; *Reply* [Doc. 24].) The
Court found this motion suitable for determination on the papers submitted and without oral
argument in accordance with Civil Local Rule 7.1(d.1). (*Order re: Oral Argument* [Doc. 25].)
For the following reasons, the Court **DENIES** Defendants' motion.

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1 **I. BACKGROUND**

2 According to the Second Amended Complaint¹, Plaintiff Roxane Amundson
3 (“Amundson”), a Canadian citizen, traveled to the city of Cabo San Lucas in the State of Baja
4 California Sur, Mexico with her cousin and decedent Ronda Cross (“Cross”). (SAC ¶¶ 4, 6.)

5 On March 3, 2012, Amundson booked a scuba diving excursion with Conquest Divers of
6 Cabo San Lucas (“Conquest Divers”). (SAC ¶ 10.) Amundson alleges that the air tanks
7 provided to Conquest Divers for the excursion were filed by Sunshine Dive & Charter
8 (“Sunshine”). Sunshine was a tenant of the Wyndham Cabo San Lucas Resort (“Wyndham
9 Resort”). (*Id.* ¶ 8.) Amundson claims that Wyndham Resort “supervised, controlled, advertised,
10 endorsed, recommended, employed and contracted with Sunshine to provide said excursions.”
11 (*Id.*)

12 Upon arrival to the dive site aboard a Conquest Divers vessel, Amundson and Cross
13 began their scuba dive. (SAC ¶ 11.) Amundson claims that “the air tanks provided . . . were
14 filled with a toxic gas, or other hazardous substance” and as a result, “the decedent died and
15 plaintiff Amundson suffered personal injuries and severe emotional distress.” (*Id.*) Based on
16 the foregoing, the Second Amended Complaint includes causes of action for negligence and
17 strict products liability against Wyndham Hotels and Resorts and AMX Baja Holdings S de R L
18 de CV (“Defendants”). (SAC ¶¶ 12-17, 18- 25.)

19 Defendants now move to dismiss the matter for *forum non conveniens*. Defendants argue
20 that the case should be dismissed because “1) [t]he State of Baja California Sur, Mexico,
21 provides an alternative forum in which this action should be tried; 2) Mexican law provides
22 adequate alternative forum to hear Plaintiff Amundson’s claims; 3) [t]he private interest factors
23 associated with this dispute favor a dismissal for *forum non conveniens*; and 4) [t]he private [sic]
24 interest factors associated with this dispute favor a dismissal for *forum non conveniens*.”

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27 ¹ This case was initially filed in California state court with Edward Kryzanowski, Dora
28 Kryzanowski, and Roxane Amundson as named plaintiffs. (*Original Complaint* [Doc. 1-1] 2.)
When the Second Amended Complaint was filed, only Roxane Amundson was named as a
plaintiff. (SAC 1.)

1 (MTD 2-3.)

2 3 **II. LEGAL STANDARD**

4 A court may decline to exercise jurisdiction in a case where litigation in a foreign forum
5 would be more convenient for the parties. *Gulf Oil Corp. V. Gilbert*, 330 U.S. 501, 504 (1947).
6 When considering a motion to dismiss under *forum non conveniens*, a court must examine: “(1)
7 whether an adequate alternative forum exists; and (2) whether the balance of private and public
8 interest factors favors dismissal.” *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1142 (9th Cir.
9 2001). A foreign forum is adequate when it provides the plaintiff with a sufficient remedy for
10 his wrong. *Id.* at 1143. “The defendant bears the burden of proving the existence of an
11 adequate alternative forum.” *Cheng v. Boeing Co.* 708 F.2d 1406, 1411 (9th Cir 1983). To make
12 its determination, a court may consider declarations outside the pleadings. *U.S. Vestor, LLC v.*
13 *Biodata Info. Tech. AG*, 290 F.Supp.2d 1057, 1062 n. 1 (N.D.Cal.2003) (citing *AT & T v.*
14 *Compagnie Bruxelles Lambert*, 94 F.3d 586, 589-591 (9th Cir.1996)).

15 “[T]he standard to be applied [to a motion for dismissal on the ground of *forum non*
16 *conveniens*] is whether . . . defendants have made a clear showing of facts which . . . establish
17 such oppression and vexation of a defendant as to be out of proportion to plaintiff’s
18 convenience, which may be shown to be slight or nonexistent . . .” *Cheng v. Boeing Co.* 708
19 F.2d 1406, 1410 (9th Cir 1983). In other words, *forum non conveniens* is “an exceptional tool to
20 be employed sparingly.” *Ravelo Monegro v. Rosa*, 211 F.3d 509, 514 (9th Cir. 2000).

21 22 **III. DISCUSSION**

23 Defendants argue that Amundson’s suit should be dismissed because Mexico provides a
24 more convenient forum. (MTD ¶¶ 5-14.) Amundson opposes dismissal, contending that her
25 selection of forum was not “abusive” and Mexico is not an adequate alternative forum for her
26 claims. (*Opp’n* ¶¶ 4-18.) For the following reasons, the Court agrees with Amundson.

27 As an initial matter, it appears that Amundson does not refute Defendants’ claim that the
28 case at bar could have been brought in the state of Baja California Sur, Mexico. (MTD 5-6; *See*

generally *Opp'n.*) Therefore, for purposes of this motion, the Court finds that the courts of Baja California Sur provide an alternative forum for this case. The Court must next determine if this alternative forum is “adequate.”

In support of their claim that Mexican courts provide an adequate forum for Amundson’s claims, Defendants argue that “Mexican law provides remedies quite comparable to those available in California.” (*MTD* 7.) Defendants make a number of arguments in support of this claim, all buttressed by a declaration of their expert on Mexican law, Manuel Garcia Pimentel Caraza². First, they suggest that “Plaintiff Amundson’s remedy for her tort claim of negligence would be available by bringing claims for breach of non-contractual obligations (i.e., a tort at common law) for any negligence on part of the Defendants that might have caused Plaintiff Amundson’s [sic] damages.” (*Id.*; *Decl. Caraza* ¶ 31.) Second, Defendants explain that if Amundson prevails in her breach of non-contractual obligations claims in Mexico, she would be entitled to indemnification according to Mexican Federal Civil Code 1915 (“MFCC”). (*MTD* 7; *Decl. Caraza* ¶ 54.) Third, Defendants contend that even though Amundson’s recovery is limited by MFCC 1915, it is still adequate, as courts have found that even when “foreign law imposes a severe limit on damages recoverable by a plaintiff, rendering the claim uneconomic to pursue, [this] does not necessarily render the remedy inadequate.” (*MTD* 7.) Defendants never address whether Mexican law provides an adequate forum for Amundson’s strict products liability claims. (*See generally MTD.*)

Amundson does not directly address these points, but instead presents an argument, supported by her expert on Mexican law, Luis Miguel Krasovsky³, that trumps Defendants’

² Amundson does not object to Mr. Caraza’s qualifications as an expert, so for purposes of this motion, the Court accepts Mr. Caraza’s claims with respect to Mexican law.

³ Defendants do not object to Mr. Krasovsky’s qualifications as an expert, so for purposes of this motion, the Court accepts Mr. Krasovsky’s claims with respect to Mexican law. Defendants have, however, requested that the Court disregard Mr. Krasovsky’s declaration because it is irrelevant and lacks foundation. (*Defs.’ Objections* [Doc. 24-1] 3.) Defendants contend that Mr. Krasovsky’s declaration was prepared in support of an opposition in another related case, and does not address the parties and laws at issue in this matter. However, after a review of the declaration, the Court finds that it is both relevant and does not lack foundation. It does appear that the declaration was drafted in connection with another case given the caption on

1 position. According to Amundson, “Mexico has a very limited system of damages and liability
 2 for damages can only be imposed on the wrongdoer itself.” (Opp’n 8.) This appears to be
 3 supported by Krasovsky’s declaration. (*Decl. Krasovsky* ¶ 5.) Amundson argues that because
 4 Defendants’ “liability is vicarious, which lacks the cause and effect relationship necessary to
 5 impose liability” required under Mexican law, Amundson “has no meaningful remedy at all.”
 6 (*Opp’n* 7, 8.) This is also supported by Krasovsky’s declaration, as he opines that none of the
 7 Defendants would be subject to “any liability derived from the death of an individual.” (*Decl.*
 8 *Krasovsky* 6.) So, according to Amundson, the Mexican forum is inadequate because it does not
 9 provide for liability for Defendants, while the present forum does.

10 Instead of addressing Amundson’s argument regarding liability, Defendants use their
 11 reply to rehash the arguments they made in favor of Mexican courts providing an “adequate”
 12 alternative forum. (*Reply* 4, 5.) Defendants’ failure to address this claim concedes its validity
 13 for purposes of this motion. Thus, Amundson has established that Mexico does not provide an
 14 adequate forum for her claims because Mexican law affords her no remedy at all against the
 15 Defendants. *See Piper*, 454 U.S. at 254; *see also Lueck*, 236 F.3d at 1143.

16 In light of the foregoing, the Court finds that Defendants have failed to meet their burden
 17 to provide “a clear showing of facts which . . . establish such oppression and vexation of
 18 [Defendants] defendant as to be out of proportion to [Amundson’s] convenience.”⁴ *Cheng*, 708
 19 at 1410. Therefore, Defendants’ motion to dismiss is **DENIED**. Because Defendants fail to
 20 establish that Mexico provides an adequate alternative forum, the Court need not address the
 21 parties’ arguments with respect to the private and public interest factors. *See Lueck*, 236 F.3d at
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23 the bottom of the paper. This alone, does not make the document inadmissible. Indeed,
 24 Defendants concede that the document was prepared for a case involving “the same incident.”
 25 (*Id.* 3.) Moreover, Defendants’ unsupported argument that the document “does not address the
 26 parties and laws at issue in this matter” is belied by even a cursory reading of the declaration.
 Therefore, the Court **DENIES** Defendants’ objection. The Court does not reach Defendants’
 other objections, as the material objected to is not relied on the Court’s analysis.

27 ⁴ The Court also notes that nowhere in their motion to dismiss do Defendants address
 28 Amundson’s claims under a strict liability theory. So, even if the Court were inclined to dismiss
 Amundson’s negligence claims, it could not dismiss her strict liability claims as requested.


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3 **IV. CONCLUSION AND ORDER**

4 In light of the foregoing, the Court **DENIES** Defendants' motion to dismiss for *forum*
5 *non conveniens*.

6 **IT IS SO ORDERED.**

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8 DATED: March 6, 2014

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10 M. James Lorenz
11 United States District Court Judge
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